FILED Court of Appeals Division II State of Washington 11/18/2022 9:38 AM

NO. 57188-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

J. G.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR JEFFERSON COUNTY, JUVENILE DIVISION

The Honorable Keith C. Harper, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

A Jefferson County Sheriff's deputy observed a car driving slowly down a back road at 1:00 a.m. on a winter night. Suspicious that the car did not belong in the area, where the deputy had acquaintances, the deputy ran the license plate and discovered the car's seventeen-year-old registered owner (J.G., of Bremerton) had a suspended license and had not transferred the car to his name within 45 days of purchasing it.

Without activating his lights or siren, the deputy exited his patrol vehicle and approached the car on foot. As he approached, he observed the driver to be a young black man, attempting a slow three-point turn on the icy road. Unable to get the driver's attention by tapping on the window and yelling, the deputy smashed the young man's window with his flashlight, shattering the window. Startled, the young man accelerated into a ditch.

When the deputy approached the car in the ditch, he confirmed the driver was J.G., told him he was under arrest, and questioned him at length about his reasons for being in the area.

J.G. refused to exit the car, telling the deputy he had no reason to be following him. The deputy called for backup. When a second deputy arrived, it took him less than three minutes to convince J.G. to submit to arrest.

For this encounter, the State charged J.G. with obstructing a law enforcement officer, resisting arrest, failure to transfer title, and third-degree driving while license suspended (DWLS). The Jefferson County Juvenile Court found the evidence insufficient to prove obstruction, due to the unorthodox manner in which the deputy executed the traffic stop. The court also observed that the deputy's behavior left J.G. reasonably concerned for his personal safety. Nevertheless, it held the deputy's actions fell within the scope of a proper Terry¹ stop and it found J.G. guilty of resisting a lawful arrest.

The trial court erred. The State failed to prove the deputy's actions fell within the scope of a legitimate <u>Terry</u> stop;

¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

accordingly, the evidence obtained during the stop should have been suppressed. The State also failed to present evidence sufficient to prove the offense of resisting arrest, so that count must be reversed and dismissed with prejudice. Finally, if this Court does not remand with orders to suppress the evidence obtained during the unconstitutional traffic stop, it must remand for entry of written findings of fact on both the suppression motion and the elements of each remaining count.

B. ASSIGNMENTS OF ERROR

- 1. The trial court erred by denying the motion to suppress.
- 2. The evidence was insufficient to prove J.G. resisted a lawful arrest.
- 3. The trial court erred by failing to enter findings and conclusions under JuCr 7.11.
- 4. The trial court erred by failing to enter findings and conclusions under CrR 3.6, and the error is not harmless.

Issues Pertaining to Assignments of Error

- 1. Where the evidence showed Deputy Schreier created the exigency that necessitated breaking J.G.'s car window, did the State meet its burden to prove the intrusion remained within the scope of a proper <u>Terry</u> stop? (No.)
- 2. Where Deputy Schreier arrested J.G. for failure to transfer title and third-degree DWLS, and provided no explanation for his decision to effect a custodial arrest for these administrative offenses, was the evidence sufficient to prove the offense of resisting? (No. Failure to transfer title is not a misdemeanor for which an officer may effect a warrantless arrest, and the evidence overwhelmingly supported the conclusion that the discretionary custodial arrest for DWLS was a pretext to investigate J.G.'s reasons for being in the area. On this record, any rational factfinder would doubt the arrest was lawful.)
- 3. Where the trial court failed to enter written findings and conclusions under JuCr 7.11, must this Court remand for

entry of the findings and conclusions that are supported by the evidence, and for the trial court to reconsider its decisions? (Yes. On remand the trial court is not bound by its prior decision, but it is bound by the controlling authority cited in this brief.)

4. Where the trial court failed to enter written findings and conclusions under CrR 3.6, must this Court remand for entry of the findings and conclusions? (Yes. The court's oral rulings on the suppression motion are insufficient to facilitate appellate review. When evaluating J.G.'s pretext argument on remand, the trial court must apply the objective observer standard adopted in State v. Sum, 199 Wn.2d 627, 649-53, 511 P.3d 92 (2022).)

C. STATEMENT OF THE CASE

While on patrol just before 1 a.m. on January 2, 2022, Jefferson County Sheriff's Deputy Kolby Schreier² observed "a vehicle that seemed to be parked and moving extremely slowly

² The report of proceedings refers to Deputy Schreier as "Colby," but the deputy's "Probable Cause Report" is signed, "K. Schreier" and the written filings identify him as "Kolby." CP 49-51, 67, 74.

near a group of mailboxes" on Embody Road. RP 9-11. Although slow speeds were appropriate for the icy conditions that night, the deputy thought mail-related criminal activity may have been afoot. RP 11-13, 40. His concern was heightened by the fact that he lived near the area and knew some of the residents. RP 43.

Deputy Schreier pulled up behind the car, it pulled away, and the deputy followed it. RP 13. He ran the car's license plate and it came back as having been sold to someone named J.G. of Bremerton, more than 45 days earlier. RP 13-14, 44. The return indicated title had not yet been transferred to J.G., and that another local officer had contacted J.G. a few weeks earlier and warned him that his license was suspended. RP 13-16. Deputy Schreier did a second search, on J.G.'s name and birth date, and got a return indicating a driver's license suspended in the third degree. RP 16.

As the deputy ran the plate and name, the car continued down Embody Road, activated its left turn signal, turned down a private road, attempted a three-point turn, and then drove broadside or perpendicular to the deputy. RP 21. When the two

vehicles were either 10 or 20 feet apart,³ Deputy Schreier got out of his patrol vehicle and approached the car on foot, to determine whether the driver was J.G. RP 21-22. He did not activate his siren or emergency lights. RP 21.

As he approached the car, the deputy could see a young black man in the driver's seat, clearly illuminated by the patrol vehicle's headlights. RP 22-23. The deputy shined his flashlight on his uniform, attempting to make himself visible to the young man, but the young man did not look at him as he approached. RP 24-25.

The young man continued to maneuver the car as Deputy Schreier walked up to the driver's side window. RP 25-26. From the deputy's perspective, it appeared the young man did not see him, or was pretending not to see him, as the deputy tapped on the window and gave commands to stop. RP 25-28. The young man continued to maneuver the car slowly past the deputy's patrol

³ At J.G.'s adjudication, Deputy Schreier testified to both distances. RP 21-22.

vehicle, with the deputy walking alongside and telling him to stop. RP 28-30.

When two vehicles were roughly parallel, Deputy Schreier smashed in the driver's side window with his flashlight, causing the glass to shatter. RP 29-31. The young man accelerated into a ditch where the car came to a stop and got stuck. RP 31. Deputy Schreier approached the vehicle and found the young man extremely upset. RP 35.

The young man identified himself as J.G. and Deputy Schreier informed him that he was under arrest. RP 35-36. Unable to convince J.G. to get out of the car, the deputy called for backup. RP 36-38. Sergeant Ryan Menday arrived a short time later and the two officers took J.G. into custody. RP 146-50. J.G. was 17 years old at the time. RP 135-36.

For this incident, the State charged J.G. in Jefferson County
Juvenile Court with one count of resisting arrest, one count of
obstructing a law enforcement officer, once count of driving while

license suspended (DWLS) in the third degree, and one count of failure to transfer title within 45 days. CP 46.

In his Probable Cause Report, Deputy Schreier wrote that he did not decide to contact J.G. about the DWLS or failure to transfer title until J.G. began to turn his car around, which the deputy found "suspicious":

While I was running this info the driver of the vehicle was traveling at approximately 5 MPH. The vehicles [sic] left turn signal came on at the end of the county road indicating the vehicle was going to take the driveway to the left. I'm familiar with the area and know there are only two residences down the driveway. I stayed back a little to see what the vehicle was going to do. The vehicle then turned as if it was going to make a three-point turn in the roadway (well prior to the houses). I found this suspicious and it appeared clear to me they were going to leave the area, so I decided to contact the driver about the title not being transferred. I also reasonably believed based on the information I obtained the driver was [J.G.] who had a suspended drivers [sic] license.

CP 49.

The Probable Cause Report also detailed the extensive questioning to which Deputy Schreier subjected J.G., after the deputy smashed the window, about why he was in the area:

[J.G.] was asked what he was doing down a dark county road at almost one in the morning and why he had driven down the private drive. He didn't want to tell me and said it didn't matter what he was doing and that it was none of my business. I wanted to understand his thought process and why he didn't stop and talk to me if he believed he wasn't doing anything wrong or suspicious. [J.G.] was asked again why he didn't stop. He then claimed he couldn't hear me because his radio/stereo was turned up. I couldn't hear any music coming from his vehicle while I was standing at the drivers [sic] window. There wasn't music playing once the window was broken either. He never said anything that made sense as to why he didn't stop or what he was doing. He never claimed to know anyone down Embody Road. He ended saying he had picked up friends in Port Townsend and was turning around on Embody. That didn't make sense either, and [J.G.] passed at least four driveways with better turn around areas then [sic] where he had decided to turn around. At one point I noted he had GPS pulled up on his phone while he was sitting in his car, Embody is not a road google or a maps website would take you down unless he was going to a specific address which he never indicated he was.

CP 50-51.

The defense moved to suppress "all evidence obtained by the unlawful seizure of the respondent by Jefferson County Sheriff Deputy Kolby Schreier." CP 66. It argued the Probable Cause Report showed that racial prejudice was the primary motivation for the stop, and the license and title violations mere pretext:

Deputy's Schreier's claim that he contacted [J.G.] for a title transfer seven days past the statutory deadline is belied by the fact that he clearly executed the stop based on his hunch that [J.G.], a young Black male, was doing something suspicious by traveling at very slow speeds down a dead end road, after sunset, in a rural, predominantly white county. . . . Per the holding in <u>Arreola</u>, this Court should be particularly suspect of whether the purported rationale for the stop merited police attention, given [J.G.]'s race.

CP 71.

The defense also argued that Deputy Schreier exceeded the scope of a permissible <u>Terry</u> stop when he smashed J.G.'s window. CP 71. It maintained that, even if the stop was not pretextual, "the purported basis for the stop—that the vehicle owner hadn't

[4] State v. Arreola, 176 Wn.2d 284, 290 P.3d 983 (2012).

transferred his title in a timely fashion—in no world justifies violently bashing out his window." CP 72.

The State contended Deputy Schreier had non-pretextual reasonable suspicion of DWLS and failure to transfer title, when he approached J.G.'s car, and that it was reasonable for Deputy Schreier to shatter J.G.'s window when his commands went unheeded. CP 78-80. The State also asked the court to find that J.G.'s arrest was lawful because, once J.G. confirmed his identity, Deputy Schrier had probable cause to suspect him of DWLS and failure to transfer. CP 80.

At the 3.6 hearing, Deputy Schreier testified that the return he got by running J.G.'s license plate "did not contain . . . any information about ethnicity." RP 20. He also testified that he gave increasingly loud commands to stop, and that he broke J.G.'s window because he was "trying to potentially effect his OODA loop . . . [meaning] [h]is . . . [o]bserve, orient, decide, act" process. RP 27, 30-32. Deputy Schreier said he had been trained in that technique for disrupting a subject's thought process. RP 32-33.

Deputy Schreier testified that, when he could positively identify an unlicensed driver from a prior encounter, his practice was to issue the person a citation by mail if he could not locate them in person. RP 36-38. He said he stopped J.G. to confirm his identity, which was necessary to establish probable cause to issue citations for the administrative offenses. RP 33-34.

Defense counsel conceded that Deputy Schreier had reasonable suspicion of third-degree DWLS and failure to transfer title within 45 days, when he got out of his patrol vehicle, but he argued that the window-smashing exceeded the scope of a legitimate stop. RP 67-71. He asked the trial court to consider, "is this something that would happen to a similarly situated white kid?" RP 70.

The trial court expressed skepticism that the stop occurred when Deputy Schreier broke the window, asking why it didn't occur when the deputy gave the first commands to stop. RP 72. The defense replied that it "had to do with what [J.G.] observes." RP 72. Counsel argued that the deputy's actions prior to breaking

the window were too unorthodox to indicate he was an officer effecting a detention:

[G]iven the facts of the case and the totality of the circumstances that what happened was that Deputy Schreier gets out of his car and Lord knows what reason he doesn't stay in his car and effectuate[] a car [sic] with his lights and sirens, um but he makes the decision for whatever reason to step out of his car and approach a moving vehicle on foot. He's backlit as you heard in the testimony, and whether or not he shines his light on his uniform, um, on that kind of mat patch that he has on his uniform - - you know, he's wearing a forest green uniform, it's dark out and he's approaching somebody from a position where his lights . . . are behind him so he's at an advantage where he can see that there's this young black male who may or may not be looking towards him during all or part of this stop, this, um - - you know, him approaching the car, you know but that person - - we don't know whether they can see him or not and it's probable that they can't.

And so here it is - - he is, as he comes up to the window he knocks on it and as you heard in the testimony, [J.G.] continues because it's, you know, late at night and all these factors are present. And, you know, it's not until he actually bashes the window in that the actual stop occurs.

RP 65-66.

J.G. did not testify at the 3.6 hearing.

The trial court denied the suppression motion, making the following oral ruling:

[W]ell, the officer could have done this different ways with the patrol car emergency lights lit up and all that, I don't know what else he could have done to get the Defendant to stop.

. . .

Okay, I didn't know where this was going when I read the briefs and its [sic] not really going anywhere. I mean, okay, I read the Defendant's brief and I understand - - I read the probable cause statement probably five times because I wanted to make sure I understood exactly what happened here and everything because red flags went up for people because it turned out that the Defendant was African American or whatever, black.

You - - based on the testimony and the probable cause statement and everything else, that had absolutely nothing to do with anything, okay. This is very simple, um, and - - well, it's very simple. Um, the officer for whatever reason turned down Embody Road and saw this vehicle going very slowly around 1:00 o'clock in the morning out in the snow, the ice and past midnight and so forth in this neighborhood near a string of six or eight mailboxes. He gets close enough to the vehicle to get the license plate, he runs the plate and finds out then that this vehicle has been transferred, the title had not been transferred within the 45 days. Also that the vehicle was apparently transferred to [J.G.], the Defendant,

and that [J.G.] was DWLS-third and had been warned about that in November.

Okay, so that's what he knows when he follows this vehicle. He doesn't know who the driver is, but it's a vehicle apparently, uh - - [J.G.], whoever that is, apparently owns and had not transferred the title properly and because he appears to be the owner of it from what the officer had, um, it would - - there was reasonable suspicion to believe that the driver was Defendant [G.] and he was DWLS-third.

So the officer follows the vehicle and sees the three point turn and so forth. I mean, yeah, it might have been a lot smarter for the officer to just turn[] on his emergency lights and done a traffic stop and stopped the Defendant right there. I don't know why he pulled over and got out of his vehicle and tried to make a stop on his feet in these circumstances. Um, but I wasn't out there. I'm not a trained law enforcement officer.

I don't know what motivated that decision but the fact of the matter is he had reasonable suspicion then to determine who this driver was and whether it was [J.G.] and, um, could proceed with that.

He did - - in the context, he did everything he could to get the Defendant just to stop the car, turn it off and roll his window down. And the Defendant refused for whatever reason. And the officer did nothing - - did nothing that had anything to do with ethnicity or race or anything like that. The question is asked by the Defense, oh, well, gee, would the window have been broken if the driver was white?

Yeah, I think it would have. I think exactly the same thing would have happened. Um, a lot of people in different circumstances are, um - - some degree of force is used to get people to do what they're supposed to do.

Ms. Phillips cited the statute where somebody[] who's pulled over is obligated to provide their ID or whatever and, um, so, you know, the officer had reasonable suspicion to believe that these two offenses - - and nothing says that oh, okay, these don't really (inaudible) public safety too much, I mean, transferring title and driving on a suspended license, so I don't know, should have let him drive, go down the road or leave or whatever. He made it clear he didn't have the ability to cite the guy by mail, he didn't have the ability to forward anything to the prosecutor because he had not identified who the driver was.

. . .

And there's no evidence - - and well, yeah, the biggest thing that I was waiting to hear today was whether or not on the officer's screen, the computer or whatever, it indicated, you know, race, black, nothing. There's nothing about that.

And the officer testified he had no idea the Defendant was black until he got out of his vehicle and started to approach the Defendant's vehicle and shined his light up there - - the lights were shining on it and that's when he first knew that the driver was what he described as a young black male. And the officer already decided to approach the Defendant's

vehicle and made contact with him because he was investigating a DWLS-third and failure to transfer title.

And . . . I don't know how this would have unfolded if the officer had simply turned on his lights - - blocked the road, turned on his lights and made a traditional traffic stop here on Embody Road. It's unfortunate that the window was broken. But there's no authority cited . . . to say this exceeded the scope of the Terry stop, well, nothing says that because the Defendant would not stop. He was - - he tried to run away. I mean, it's as simple as that. And the officer had the authority with reasonable suspicion to stop him. And, um, was there a different way? I don't know. In the heat of the moment, at the time of night after all the efforts the officer made to get the Defendant to stop, well, I don't find that hitting the window with the flashlight, I don't find that that was an unreasonable or unlawful act or anything like that.

This was not a pretext stop at all, and, um - - because in my view what happened here was - - would not have been unusual for this to happen with anybody, anybody sitting in that car and doing exactly what happened here. Basically allegedly DWLS-third, failed to transfer title so they've got a title violation and he was not going to stop for the officer, he wasn't going to let the officer identify him and he was trying to get away and he did everything he could to do that and got stuck in the ditch. And it could have been anybody. Could have been an old white guy, an old black person, young white person, male, female, it could have been anybody. Nothing here was out of the ordinary other than low and

behold it turns out the driver was what would be characterized as a young black male. Well, those peop - - the Defendant doesn't have a free pass just for that reason, and - - well, anyway.

So the motion to suppress is denied.

RP 72-78.

The parties stipulated to the admissibility of Deputy Schreier's 3.6 hearing testimony for purposes of the factfinding hearing two weeks later. RP 86-88. Picking up where he left off, the deputy testified that, after J.G.'s car came to rest in the ditch, the deputy walked over and they exchanged words. RP 102-03. J.G. told Deputy Schreier that the deputy was stupid and had "messed up" by breaking his window. RP 102-03.

According to Deputy Schreier, he did not ask J.G. to confirm his identity until after "the conversation . . . when he was arguing with me." RP 103. The deputy testified:

[A]fter the conversation I said - - when he was arguing . . . with me about my contact with him, I said you're [J.G.], correct, and he said yeah and then something to the effect of so what.

. . .

I explained that driving on a suspended license is a crime. Failure to transfer title within 45 days is a crime. And that he didn't stop and talk to me.

RP 103.

Deputy Schreier testified that this was followed by "[s]ome conversation back and forth," during which he advised J.G. that he was under arrest, J.G. refused his commands to step out of the vehicle, and the deputy called for backup. RP 103-04. Deputy Schreier did not say for how many minutes, total, he spoke with J.G.; nor did he say how many minutes passed before he confirmed J.G.'s identity. RP 98-126. But he acknowledged that he used some of that time to ask J.G. what he was doing in the area at that time of night, because "my curiosity got the best of me," and told J.G. that it was "suspicious that he was down there at that time of night." RP 122-23.

Deputy Schreier also testified that, while waiting for backup to arrive, he asked J.G. multiple times to get out of the car or place his hands on the steering wheel, and J.G. refused both commands. RP 105. The deputy said that, during this portion of the encounter, he grabbed J.G.'s arm at one point and advised J.G. that he could use force, including a taser or pepper spray, but ultimately decided not to do this. RP 111-12, 123-25.

Sergeant Menday testified that he responded to Deputy Schreier's call for backup. RP 146-50. He said he explained to J.G. that he fled from a lawful detention, had a suspended license, and was under arrest. RP 152. J.G. argued with the sergeant for about two minutes, and then agreed to get out of the car provided Deputy Schreier stepped back. RP 154-55. Sergeant Menday told Deputy Schreier to stand back, he did, and J.G. submitted to arrest. RP 155, 158-59.

The State also presented testimony by Jefferson County
Sheriff's Deputy Dean Murray and Department of Licensing
(DOL) records custodian Sara Morgan.

Deputy Murray testified that he had encountered J.G. and his vehicle during a routine patrol in Chimacum, on November 29, 2021, and discovered upon running J.G.'s name and license plate

that his driver's license was suspended in the third degree and the car was not legally registered in his name. RP 126-39. The deputy said he allowed J.G. and his companion to leave the scene on foot, issuing only a warning in lieu of a citation. RP 139-41.

Ms. Morgan presented various DOL records, including some showing that J.G.'s driver's license was revoked between September 1, 2020, and August 31, 2021, for use of a vehicle in a felony, and that it remained suspended as of January 2, 2022, because J.G. had not yet satisfied financial and driver's testing prerequisites to reinstatement. RP 169-72.

J.G. testified that he took a wrong turn while driving down Embody Road looking for a gas station. RP 184-85. As he was turning around on an icy back road, he noticed a car following him with its brights on, but he did not think it was law enforcement. RP 185-87. He turned around and maneuvered past the car, listening to music and unaware that anyone was trying to get his attention. RP 189, 193-94, 211-19. Suddenly, someone smashed

his window and he lost control of the car, careening into a ditch. RP 192-95, 220.

J.G. testified that he did not realize Deputy Schreier was a law enforcement officer until after the deputy broke his window and he came to rest in the ditch. RP 195.

J.G. admitted that, when Deputy Schreier engaged him after breaking the window, J.G. knew the deputy was trying to arrest him. RP 198-99. But J.G. said the deputy at first gave him only two reasons for the detention: failing to stop—which J.G. took to mean the officer incorrectly believed he had run a stop sign—and having no reason to be in the area at night. RP 195-96. J.G. said Deputy Schreier talked with him for about five minutes before mentioning that J.G. was driving without a license. RP 196-97, 221-22. He also testified that his entire conversation with Deputy Schreier lasted "five to seven minutes" before Sergeant Menday arrived. RP 223-24.

J.G. said he was angry and stressed because he knew how expensive it would be to fix the window, he was worried (based on

a prior experience with law enforcement) that officers would lose the money and personal items he had in the car, and he didn't understand why Deputy Schreier had not pulled him over with lights and sirens "like normal." RP 198-203. In light of all these circumstances, J.G. did not trust Deputy Schreier and decided to refuse his commands to exit the vehicle. RP 198-99, 222-23. When Sergeant Menday arrived, explained the reasons for the arrest, and deescalated the situation, J.G. decided to comply. RP 203-04.

After J.G. testified, the defense moved again to "restate my 3.6 motion . . . based on new evidence that's come into the record during this hearing." RP 228. The court denied the motion immediately without comment. RP 228.

In closing the State acknowledged that, for J.G. to be guilty of resisting arrest, the attempted arrest had to have been lawful. RP 232. It contended that this question had been decided at the 3.6 hearing, where the trial court ruled that Deputy Schreier's use of force was reasonable. RP 232-33. The State also argued that J.G.

committed "more resisting" when Sergeant Menday arrived and he did not immediately exit the vehicle. RP 233.

The defense conceded the State had proved third-degree DWLS and failure to transfer title. RP 234. But counsel argued that the obstructing and resisting charges stemmed from Deputy Schreier's decision to conduct the initial stop in a confusing and "manifestly unreasonable" manner. RP 235-37.

The trial court agreed that the evidence was insufficient to prove J.G. committed obstruction. RP 242. The court explained that, given the inexplicable manner in which Deputy Schreier approached J.G.'s car, the State had not proved beyond a reasonable doubt that J.G. knew, prior to the window breaking, that he was being approached by a law enforcement officer. RP 239-40, 242. But the court found the evidence sufficient to prove J.G. resisted arrest. RP 242-43. It explained that J.G. refused Deputy Schreier's order to exit the car even though "he knew he was DWLS-third and he knew he hadn't transferred the title," and that J.G. also "resisted and was uncooperative . . . [for] several

minutes" after Sergeant Menday asked him to get out of the car.

RP 242-43. The court also found J.G. guilty of the two administrative misdemeanors he admitted to. RP 240-41.

In the course of its lengthy oral ruling, the trial court revisited the question of pretext raised at the 3.6 hearing. RP 238-40, 244-47. It came to six conclusions.

First, the court concluded there was no evidence that Deputy Schreier was aware of J.G.'s race "before he made contact," and it explained that—had there been any such evidence—it would have granted the suppression motion:

[T]he whole thrust of the 3.6 hearing and the 3.6 motion by the Defense was that this was a pretextual stop based on race. . . . So I earnestly listened to the evidence at the 3.6 hearing expecting to hear something about that. What I expected there to be quite frankly was evidence that Officer Schreier knew ahead of time before he made contact with the Defendant that the Defendant was a black male as he was later described. That evidence never appeared.

... I don't know what's on a screen in a patrol car or what you get when you radio in for descriptions of anything like that. I don't know and there was no evidence of it.

And . . . I'll assure you that if that would have been the case then this case would have been just thrown away, thrown out without any hesitation if I would have thought that that was true. And I was not able to make that determination from what was presented.

RP 238-39.

Second, the court found there was no explanation for the manner in which Deputy Schreier conducted the stop, and that a traditional lights and sirens detention would have prevented any confusion about the deputy's identity:

[T]he second thing I said at the 3.6 hearing was, you know . . . I'm not a law enforcement officer and haven't had law enforcement training, but I did not understand why Deputy Schreier ended up making the stop the way that he did. And I've heard the same stuff today and I still don't understand why this stop was made the way it was.

The Defendant says gee, if there were, you know, the red and blue lights on and so on and/or siren, yeah, I would have stopped. But that didn't happen, this was unusual. It was after 1:00 o'clock at night, it was on a dirt road where nobody goes down and . . . instead of that kind of a stop of a vehicle . . . the officer simply pulls over, stops his vehicle, leaves his lights on, gets out and then apparently shines himself up with a flashlight and tries to approach the Defendant on foot.

The Defendant says I never saw him and I never saw a person outside of that vehicle until my driver's side door window got smashed. I do not know which of those scenarios are true. So, um - and there wouldn't have been any doubt if the officer's lights would have simply went on and then we see what happens then because there would have been no doubt that the Defendant would have known and seen that there was a law enforcement officer - law enforcement vehicle with its colored lights on and that means a traffic stop. It would have been so easy.

RP 239-40.

Finally, the court opined that (1) if Deputy Schreier in fact asked J.G. what he was doing in the neighborhood, this was inappropriate because J.G. had a right to be there; (2) the court did not know and would not rule on whether the window had to be broken; (3) in light of all the circumstances, and J.G.'s experience with law enforcement, J.G. was reasonably concerned for his personal safety during his interaction with Deputy Schreier; and (4) the situation could have been simple and easy, "if [J.G.] had chosen to handle it differently":

Um, and I just need to comment . . . and . . . if I knew the answer to this, I'd be doing something much more important that I am probably doing here, um, another thing that was confusing to me was - this came up at the 3.6 hearing, it was - - it came up again today.

Um, there were some vague questions about oh, Officer Schreier, this is your neighborhood, you're familiar with it, yeah, yeah, and then at the 3.6 hearing there was some comment about some house down the road that there - - had been sold and Officer Schreier was aware of it. . . . Um, now today, the Defendant testified . . . the officer came up to him and said . . . you failed to stop back there and, um and what are you doing in this neighborhood or what business do you have in this neighborhood. I don't know if that's true or not. Um, I know the Defendant was told he was DWLS-third and had failed to transfer his title and ultimately that's what he was arrested for . . .

[B]ut whether or not . . . the Defendant had any business in that neighborhood, I don't know if that was relevant to anything. Um, I mean, ultimately there was no reports of any mail being stolen, there was no reports of any other criminal activity, the Defendant was just trying to get out of there ultimately. And . . . his story is I took a wrong turn down that road looking for a gas station. And who know, that might be true, but . . .

The issue of pretextual stop was raised at the 3.6 hearing, I think that was raised again today by the Defendant testifying that well, he asked me why I

was in that neighborhood, and well, he was in that neighborhood because - - well, one, he had a right to go down that road I think, and two, he may have made a wrong turn. Because other than a license violation, and other than a car title violation, he hadn't done anything else wrong. So . . . I don't know what that's all about. But he testified too that he had a bad experience with a law enforcement officer and lost a whole bunch of belongings and he was concerned here, um for his belongings he said but his story is gee, I didn't know it was a law enforcement officer until the officer broke my window. And then he was angry about that. And I don't know whether the window had to be broken or not, I'm not going to make that decision or go down that rabbit hole. But [J.G.] was upset about his window being broken and apparently he had to pay for getting it fixed.

Um, and that doesn't excuse, you know, what else he failed to do here, um, but I say all that because he says yeah, his trust of not only officers prior but Officer Menday^[5] was sort of low on a one to 10 scale. Um, and like I say, I don't know the answer to that dilemma, because from his standpoint he was out on a dark road all by himself after 1:00 in the morning on a cold and icy and snowy night and there was a car with lights on there that he didn't know who it was. And then he ends up getting his window broken in his car and ends up there one-on-one with an officer.

^[5] The trial court may have intended to say, "Officer Schreier," here. At the factfinding hearing J.G. testified that, during the entire encounter, his level of trust in Deputy Schreier was about a one, on scale of one to ten, and his trust in Sergeant Menday was about a five. RP 227.

And, um - - but he was able to settle down and Officer Menday was able to deescalate the situation apparently in such a way that he then went willingly with Officer Menday.

So my point is that on the one hand, [J.G.] was concerned about I think his personal safety and security and so on, and I don't blame him given what's been happening in our country for the last three years or more in particular. Um, but on the other hand, the other side of it is that as I said, this could have been an easy, pretty simple situation maybe if [J.G.] had chosen to handle it differently. Um, I don't know. But fortunately nobody got hurt, and that's what concerns me is somebody could have easily gotten hurt here.

RP 244-47.

The court imposed a standard range disposition of supervision until J.G.'s eighteenth birthday, a total of eight months. CP 94-96. J.G. timely appealed. CP 116.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS

Under the Fourth Amendment and article I, section 7, a warrantless seizure is per se unreasonable unless it falls within one of the narrow, carefully delineated, and jealously guarded

exceptions to the warrant requirement. <u>Katz v. United States</u>, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); <u>State v. Buelna Valdez</u>, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). "These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement." <u>State v. Patton</u>, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

The State bears the burden of proving a valid exception to the warrant requirement. State v. Tibbles, 169 Wn.2d 364, 372, 236 P.3d 885 (2010). Accordingly, when the warrantless intrusion is a Terry stop, the State bears the burden of showing it did not exceed the scope of a permissible investigative detention. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

When a trial court denies a motion to suppress, this Court reviews the trial court's conclusions of law de novo. <u>State v.</u> <u>Winterstein</u>, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

To determine whether an officer exceeded the scope of a proper Terry stop, the reviewing court considers "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." State v. Smith, 115 Wn.2d 775, 786, 801 P.2d 975 (1990). An officer exceeds the scope of a proper Terry stop unless he uses the "least intrusive means reasonably available" to confirm or dispel his suspicions. State v. Belieu, 112 Wn.2d 587, 599, 773 P.2d 46 (1989); State v. Mackey, 117 Wn. App. 135, 139, 69 P.3d 375 (2003) (means of investigation need not be least intrusive available, but "police must reasonably try to identify and pursue less intrusive alternatives").

Here, the record shows that Deputy Schreier approached J.G. in the dark, backlit by his patrol vehicle's headlights, and without activating his siren or emergency lights. RP 21-25. When tapping on J.G.'s window did not alert J.G. to the fact that a law enforcement officer was effecting a traffic stop, Deputy Schreier shattered J.G.'s window, scaring him so badly that he accelerated

off the icy road and into a ditch. RP 25-31. The deputy testified that this was intentional: he wanted to disorient J.G. RP 30-33.

In its initial ruling on the motion to suppress, the trial court opined that Deputy Schreier's decision to break J.G.'s window was not unreasonable "after all the efforts the officer made to get the Defendant to stop." RP 77-78. But in its final ruling, after hearing J.G.'s testimony at the factfinding hearing, the court found that Deputy Schreier had never provided any explanation for the manner in which he conducted the initial attempted stop, that a typical lights and sirens stop would have prevented any misunderstanding, and that the manner in which Deputy Schreier conducted the entire stop caused J.G. to be legitimately "concerned about . . . his personal safety and security." RP 239-40, 246.

Given these facts, the State did not meet its burden to prove a legitimate <u>Terry</u> stop. An officer may not create an exigency and then exploit it to circumvent constitutional protections. <u>State v. Muhammad</u>, 194 Wn.2d 577, 598-99, 451 P.3d 1060 (2019); <u>State v. Flores</u>, 186 Wn.2d 506, 524, 379 P.3d 104 (2016); <u>State v. Hall</u>,

53 Wn. App. 296, 303, 766 P.2d 512 (1989). Where Deputy Schreier offered no explanation for the manner in which he conducted the initial attempted stop, and where he testified that he broke J.G.'s window not because he had no alternative (such as returning to his immediately adjacent patrol vehicle and activating its lights) but because he wanted to disorient J.G., the State has not met its burden to prove the investigative detention was reasonably limited in scope.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence become fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing State v. Kennedy, 107 Wn.2d 1, 4,726 P.2d 445 (1986)). Because the State did not meet its burden to prove a legitimate Terry stop, the trial court erred by denying the motion to suppress. This Court must remand with instructions to grant the motion.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE J.G. RESISTED A LAWFUL ARREST

Due process under the state and federal constitutions requires that the State prove each element of a charged crime. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); accord U.S. CONST. amend. XIV; CONST. art. I, § 3.

[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); accord State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The critical inquiry in reviewing sufficiency of the evidence is to "determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." State v.

Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016) (quoting Jackson, 443 U.S. at 318). This inquiry disturbs the discretion of the fact finder only "to the extent necessary to guarantee the fundamental protection of due process of law." Jackson, 443 U.S. at 319. The inquiry focuses on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (emphasis in original).

Sufficiency of the evidence is a question of constitutional law reviewed de novo on appeal. <u>State v. Rich</u>, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). If the evidence is insufficient to support a conviction, the appellate court must reverse and remand for dismissal of the charge with prejudice. <u>State v. Rodgers</u>, 146 Wn.2d 55, 60, 43 P.3d 1 (2002).

RCW 9A.76.040 provides that "[a] person is guilty of resisting arrest if he or she intentionally[] prevents or attempts to prevent a peace officer from *lawfully* arresting him or her." (Emphasis added.) Thus, as the State properly conceded at trial, a

"lawful" arrest is an element of the crime: J.G. could not be convicted of resisting an unlawful arrest. RP 232. See State v. D.E.D., 200 Wn. App. 484, 496 & n.10, 402 P.3d 851 (2017) ("The legislature has only imposed a duty to cooperate with a lawful arrest... By implication, there is no duty to refrain from resisting an unlawful arrest.").

The trial court accepted the State's argument that J.G. was placed under lawful arrest for two offenses: failure to transfer title and third-degree DWLS. CP 80; RP 242-43. The trial court erred. As explained below, an officer never has legal authority to effect a warrantless arrest (or even an investigative detention) for failure to transfer title. And based on the evidence presented at the 3.6 and factfinding hearings, no rational factfinder could conclude beyond a reasonable doubt that the custodial arrest for DWLS was non-pretextual. Because a pretextual arrest is not a lawful arrest, the evidence was insufficient to prove the offense of resisting.

a. J.G.'s arrest for failure to transfer title was unlawful because an officer lacks authority even to detain a suspect on suspicion of this misdemeanor.

An officer's authority to effect a warrantless arrest derives from RCW 10.31.100. That statute permits a warrantless arrest for a misdemeanor or gross misdemeanor offense only when the offense is committed in the officer's presence "except as provided in subsections (1) through (11)." RCW 10.31.100. As relevant here, subsection (3) allows a police officer to effect a warrantless arrest upon probable cause to believe a person has committed any of several enumerated traffic offenses. RCW 10.31.100(3).

Failure to transfer title is not one of the misdemeanors for which an officer may conduct a warrantless arrest. RCW 10.31.100. Indeed, it is not even an offense for which an officer may *detain* a suspect so as to issue a citation. RCW 46.64.015. This statutory scheme makes sense: once DOL records reveal that a suspect has failed to transfer title there is nothing more to investigate, so an officer has no reason to detain a person on

suspicion of this offense. <u>State v. Walker</u>, 129 Wn. App. 572, 575-78, 119 P.3d 399 (2005).

Because failure to transfer title is not an offense for which an officer may detain or arrest a suspect, Deputy Schreier had no lawful authority to arrest J.G. for this offense. To the extent J.G. resisted arrest for failure to transfer title, he did not commit the crime of resisting (a lawful) arrest.

b. An officer has statutory authority to effect a custodial arrest for third-degree DWLS, but he must exercise this discretion consistent with article I, section 7.

Unlike failure to transfer title, third-degree DWLS *is* one of the traffic offenses enumerated in the warrantless arrest statute. RCW 10.31.100(3)(f). But while an officer may arrest a person for DWLS, it is certainly not required. <u>State v. Johnson</u>, 155 Wn. App. 270, 229 P.3d 824 (2010). Instead, the officer may issue a citation and allow the person to leave the scene. <u>Id</u>.

In <u>State v. Pulfrey</u>, 154 Wn.2d 517, 523-28, 111 P.3d 1162 (2005), our supreme court held that an officer may, pursuant to his

standard "practice," effect a warrantless custodial arrest for a traffic offense listed in RCW 10.31.100(3) and then later decide whether to cite and release the driver. Pulfrey did not reach any constitutional question, but it held an officer has no statutory or public policy-based duty to consider alternatives to custodial arrest in the first instance. Id. And one year later, in State v. Walker, 157 Wn.2d 307, 314-19, 138 P.3d 113 (2006), our supreme court held that article I, section 7 places no limits on the legislature's power to determine which misdemeanors are eligible for discretionary warrantless arrest upon probable cause.

Together, <u>Pulfrey</u> and <u>Walker</u> grant law enforcement officers wide discretion to effect warrantless custodial arrests for the traffic violations listed in RCW 10.31.100(1)(c). This includes the offense of which J.G. was ultimately adjudicated guilty: driving while eligible to reinstate a suspended license, but before having completed the financial and administrative prerequisites to reinstatement. CP 46; RP 169-72; RCW 46.20.342(1)(c)(vi). Indeed, officers in Washington State have greater constitutional

authority to jail a driver for this administrative offense—including a child reasonably "concerned for his personal safety and security" —than to impound his car. State v. Villela, 194 Wn.2d 451, 460, 450 P.3d 170 (2019) (article I, section 7 prohibits legislation authorizing officer to impound arrested driver's car before exploring reasonable alternatives).

But while officers have relatively wide discretion to arrest for third-degree DWLS, this discretion is not unlimited. Like any seizure, an arrest for the traffic offenses listed at RCW 10.31.100(3) must be reasonable under article I, section 7. See Arreola, 176 Wn.2d at 296 (court must carefully scrutinize exercise of detention discretion under article I, section 7).

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⁶ RP 246.

⁷ As this Court recognized 45 years ago, the rule limiting impoundment derives from a long-standing policy concern about pretextual invasions of privacy: "Absent any express justification by the State . . . concerning the impoundment, the procedure risks creating a suspicion that it was a mere pretext for a general exploratory search. <u>State v. Hardman</u>, 17 Wn. App. 910, 913, 567 P.2d 238 (1977).

c. A discretionary custodial arrest violates article I, section 7 protections if it is a pretext to investigate without probable cause.

Unlike the Fourth Amendment to the United States Constitution, article I, section 7, of the Washington Constitution prohibits "pretextual" seizures. <u>Ladson</u>, 138 Wn.2d at 358. A pretextual seizure is a stop or arrest in which an officer uses an alleged violation as "a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." <u>Id</u>. It is "a false reason used to disguise a real motive." <u>State v. Nichols</u>, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

Whether a stop was pretextual is determined on the totality of the circumstances, considering both the subjective intent of the officer and the objective reasonableness of the officer's behavior.

Ladson, 138 Wn.2d at 358-59. The trial court's conclusions of law are reviewed de novo. Arreola, 176 Wn.2d at 291.

In <u>Arreola</u>, 176 Wn.2d at 288, our supreme court held that a "mixed-motive" stop—one motivated by both pretextual and

legitimate officer concerns—satisfies article I, section 7 only if the officer's "desire" to address the reasonably suspected offense "is an actual, conscious, and independent cause" of the stop. Thus, a mixed-motive stop passes constitutional muster only if the officer would have seized the suspect for the reasonably suspected offense alone, without the other, invalid motivation. Id. at 298-300.

While both Arreola and Ladson address traffic stops, rather than custodial arrests, Ladson derived its constitutional holding from the "strict no-pretext rule" adopted State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962), abrogated on other grounds as recognized in State v. Carter, 74 Wn. App. 320, 325-26, 875 P.2d 1 (1994), a case addressing a pretextual custodial arrest.⁸

In Michaels, officers were alerted to look for the car in which the defendant was driving, but they did not have probable

⁸ Citing Michaels, the Ladson Court explained, "[j]ust as an arrest may not be used as a pretext to search for evidence, a traffic

Michaels, 60 Wn.2d at 640-44).

infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further." 138 Wn.2d at 353 (citing

cause to suspect the car contained any contraband. 60 Wn.2d at 639-40, 644. They followed the defendant until he committed a minor traffic offense in their presence (failing to signal before making a left turn), arrested him for that offense, and then searched his car incident to arrest, discovering suitcases of dice, magnets, and magnetized dice in his trunk. Id. at 639-40.

At his prosecution for illegal possession of gambling devices, the defendant moved to suppress the contents of the trunk, arguing they were the fruits of an illegal search. <u>Id</u>. The trial court denied the motion and our supreme court reversed. <u>Id</u>. at 640, 645.

Our supreme court began by recognizing that the misdemeanor offense at issue (failing to signal) was an arrestable offense implicating the search incident to arrest exception to the warrant requirement

The well-settled rule is that an officer may take into custody a person who commits a misdemeanor in his presence, and upon making the arrest, may search the person and his immediate environs for evidence of the crime or tools which would aid in the arrested person's escape.

<u>Id</u>. at 642-64 (emphasis omitted). But the Court held the rule did not justify the search in that case, where the evidence showed the arrest was a pretext for a broader search:

The evidence in this case conclusively shows that the arrest was made for the sole purpose of searching the automobile to ascertain whether it contained any contraband property. It was a mere pretext for the search and was therefore unlawful.

Id. at 645.

Under <u>Michaels</u>, <u>Ladson</u>, and <u>Arreola</u>, a discretionary misdemeanor arrest violates article I, section 7 if it is effected as a pretext to evade the warrant requirement.

d. The evidence was insufficient to prove J.G. resisted a lawful arrest, because the State did not prove Deputy Schreier exercised his discretion consistent with article I, section 7.

In <u>State v. Sum</u>, 199 Wn.2d at 649-53, our supreme court held that, because "the warrantless seizure context" implicates racial discrimination that is both endemic and often difficult to prove, Washington courts must apply the GR 37 framework when determining whether a person has been "seized" for purposes of

article I, section 7. In the context of jury selection, where a party alleges racial discrimination in the use of peremptory challenges, GR 37 requires the trial court to determine whether "an objective observer could view race or ethnicity as a factor in the use of the . . . challenge."

Applying that framework to the test for a "seizure," under article I, section 7, the <u>Sum</u> court held that "a person has been seized as a matter of independent state law if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate a police encounter due to law enforcement's display of authority or use of physical force." 199 Wn.2d at 653. And the court explained that, as under GR 37, "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington." <u>Sum</u>, 199 Wn.2d at 653.

Sum's rationale applies with equal or greater force to the question of pretext in Terry stops or discretionary custodial arrests. A pretextual stop or arrest is a "warrantless seizure," implicating all the policy concerns about disproportionate policing at issue in Sum. Compare Sum, 199 Wn.2d at 651 (BIPOC are subject to excessive police contacts, investigative seizures, and uses of force by law enforcement") and Arreola, 176 Wn.2d at 296 ("in many cases, the occupants [of a vehicle seized on pretextual grounds] will be palpably aware of . . . an abuse of police discretion"). And, like the analysis for determining whether a seizure has occurred, the pretext analysis entails an objective inquiry into what is "reasonable" given the "totality of the circumstances." Compare Sum, 199 Wn.2d at 652-53 and Arreola, 176 Wn.2d at 296-97. Consistent with Sum, 199 Wn.2d at 649-53, a court applying the pretext inquiry should ask whether an objective observer could conclude that the officer did *not* actually, consciously, and independently determine that a discretionary detention was reasonably necessary to address the suspected traffic infraction.

See Arreola, 176 Wn.2d at 288, 297-98.

Had the trial court applied this analysis to J.G.'s discretionary custodial arrest, it could not have found the arrest non-pretextual beyond a reasonable doubt.

Deputy Schreier testified that he had mixed motives for the initial stop: first, he followed J.G.'s car and ran the license plate because he had a vague hunch that "criminal activity may be afoot"; second, when the search linked the license plate to the two administrative offenses, the deputy needed to confirm the driver's identity before he could issue any citation. RP 12-13, 33-34.

The trial court found the initial stop was not pretextual. RP 78. But it did not expressly decide whether the deputy's reasonable suspicion of DWLS was "an actual, conscious, and independent cause" of the stop, under <u>Arreola</u>, 176 Wn.2d at 288. <u>See RP 73-78</u>. Instead, the court appeared to assume, incorrectly, that the initial decision to stop the car could not have been

pretextual if the deputy made that decision before he knew J.G. was black. See RP 73-75.

Nor did the trial court consider the discretionary seizure that occurred after Deputy Schreier broke J.G.'s window: the discretionary custodial arrest. But it is manifestly clear from the record that this was a departure from the deputy's typical practice.

As noted, Deputy Schreier testified that he needed to stop J.G. only to confirm his identity. He said his typical practice, when he recognized a driver whose license he had reason to suspect was suspended, was to attempt to contact them in person but, failing that, to mail them a citation. RP 36-38. The deputy did not testify that he ever arrested anyone for this offense in the course of his normal duties. And Deputy Murray testified that, when he previously advised J.G. about the administrative offenses, he did not even issue a citation. RP 139-41. In short, there is no evidence in the record that any Jefferson County Sheriff's deputy normally effected a custodial arrest for the administrative traffic offense of third-degree DWLS.

By contrast, there is ample evidence the Deputy Schreier thought J.G.'s mere presence in the neighborhood was "suspicious." CP 49-51; RP 123. The deputy testified that he first followed J.G. and ran his license plate because J.G. was driving slowly, on an icy back road, near the mailboxes that belonged to the deputy's acquaintances. RP 11-13, 40, 43. Deputy Schreier's probable cause statement is less than three pages long, with roughly one full page detailing the deputy's attempts to make J.G. explain what he was doing in the area. CP 49-51. Indeed, at the factfinding hearing, it was undisputed that Deputy Schreier questioned J.G. at length, after breaking the window, about his reasons for being in the area. RP 122-23, 195-97.

The trial court correctly zeroed in on this evidence, noting that J.G. had a right to be in the neighborhood, and that he had done nothing illegal (or suspicious) by making a wrong turn or a three-point turn. RP 244-47. But the trial court erroneously concluded that it did not need to decide what role Deputy Schreier's unfounded suspicions played in his decisions to stop and ultimately

arrest J.G. RP 244-45. The court appeared to feel it was enough simply to admonish the deputy after the fact. RP 245-46. This was error.

The admonishment was no doubt helpful and well intentioned, but it was insufficient to resolve the legal question presented: whether J.G. resisted a *lawful* discretionary arrest. If Deputy Schreier would typically have issued a citation for thirddegree DWLS, and let J.G. leave the scene, but arrested him instead so he could investigate vague suspicions about the reason J.G. was in the neighborhood, the arrest was pretextual. Arreola, 176 Wn.2d at 298-300; Ladson, 138 Wn.2d at 353 (citing Michaels, 60 Wn.2d at 640-44); cf. Johnson, 155 Wn. App. 270 (rejecting claim of pretextual DWLS stop and arrest because "[t]he facts here do not fall within the classic pattern" where "the arresting officer ha[s] a suspicion of nontraffic related criminal activity and subsequently follow[s] an arrestee's vehicle until a traffic violation occurs"). And a pretextual arrest is not a "lawful arrest," for purposes of the resisting statute. <u>Ladson</u>, 138 Wn.2d at 360 (pretextual arrest is "without authority of law"); see D.E.D., 200 Wn. App. at 496 & n.10; RCW 9A.76.040 (no duty to submit to unlawful arrest).

At J.G.'s adjudication, the State bore the burden of proving a lawful arrest. Winship, 397 U.S. at 364; RCW 9A.76.040. But it presented no evidence that Jefferson County Sheriff's deputies typically, or ever, effected warrantless custodial arrests for third-degree DWLS. And there was overwhelming undisputed evidence that Deputy Schreier arrested J.G. because he wanted to find out why he was in the area at 1 a.m. CP 49-51; RP 122-23, 195-97. On this record, any rational factfinder would doubt the lawfulness of J.G.'s arrest.

3. REGARDLESS OF ITS DECISION ON THE SUFFICIENCY CLAIM, THIS COURT MUST REMAND FOR ENTRY OF WRITTEN FINDINGS AND CONCLUSIONS ON ANY REMAINING COUNT

When a juvenile appeals a conviction, the trial court must enter written trial findings and conclusions. JuCR 7.11 provides, in pertinent part:

- (c) Decision on the Record. The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.
- (d) Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

JuCR 7.11 (c),(d).

This rule requires that the court, in a juvenile adjudicatory hearing, enter formal findings and conclusions regarding each element of the offense charged. Otherwise, the findings and conclusions will be deemed inadequate. State v. Souza, 60 Wn. App. 534, 537, 805 P.2d 237, review denied, 116 Wn.2d 1026, 812 P.2d 103 (1991). The purpose of written findings is to allow the appellate court to determine the basis on which the case was decided and to review any issues raised on appeal. State v. Pena,

65 Wn. App. 711, 715, 829 P.2d 256 (1992), overruled on other grounds, State v. Alvarez, 128 Wn.2d 1, 18-21, 904 P.2d 754 (1995).

Because Judge Harper failed to enter findings and conclusions, remand is appropriate so that the court can enter the findings and conclusions that are warranted by the evidence and the authority cited in this brief. Alvarez, 128 Wn.2d at 17-19; Souza, 60 Wn. App. at 540-41. When doing so, Judge Harper may consider only the evidence previously presented, but he is not bound by his earlier decision, and the parties may appeal from any new judgment. State v. Head, 136 Wn.2d 619, 625-626, 964 P.2d 1187 (1998); Alvarez, 128 Wn.2d at 20-21.

4. IF THIS COURT DOES NOT REMAND FOR SUPPRESSION BASED ON THE EXISTING RECORD, THE CASE MUST BE REMANDED FOR ENTRY OF WRITTEN FINDINGS AND CONCLUSIONS ON THE DEFENSE MOTION TO SUPPRESS

Criminal Rule 3.6(b) provides: "If an evidentiary hearing is conducted [on a motion to suppress], at its conclusion the court

shall enter written findings of fact and conclusions of law." This requirement applies in juvenile court, as well. JuCR 1.4(b) ("The Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes.")

The failure to enter written findings and conclusions is error, and it is harmless only if the trial court's oral ruling is sufficient to permit meaningful appellate review. State v. Barber, 118 Wn.2d 335, 345, 823 P.2d 1068 (1992); State v. Weller, 185 Wn. App. 913, 923, 344 P.3d 695 (2015). In J.G.'s case, the trial court's oral ruling on the motion to suppress is not sufficient to permit meaningful appellate review.

First, when addressing the question of pretext, the trial court failed to apply the "actual, conscious, and independent cause" test articulated in <u>Arreola</u>, 176 Wn.2d at 288. <u>See RP 73-78</u>. The court clearly rejected the defense theory that the initial stop was racially motivated, but that is not sufficient. A stop can be prextual without also being race-based. Here, the record indicates Deputy

Schreier initially found J.G.'s car "suspicious" simply for being near his friends' mailboxes. RP 11-13, 40, 43.

In its final ruling, the court expressed concern about Deputy Schreier's baseless suspicions, but it is not clear whether the court appreciated the relevance of these suspicions to the question of pretext. See RP 245 ("whether or not the Defendant had any business in that neighborhood, I don't know if that was relevant to anything"). Remand is warranted so the court can apply the correct legal standard—the "actual, conscious, and independent cause" test articulated in Arreola, 176 Wn.2d at 288—to each of the deputy's discretionary intrusions. These include (1) the initial decision to stop J.G.'s car and approach it on foot in the dark, (2) his subsequent decision to shatter the window, and (3) the ultimate decision to place J.G. under custodial arrest.

When applying that standard, the court must consider the totality of the circumstances, including the deputy's awareness of J.G.'s race before the second and third discretionary acts. <u>Sum</u>, 199 Wn.2d 627 (in article I, section 7 analysis, "totality of the

circumstances" includes race and ethnicity); <u>Arreola</u>, 176 Wn.2d at 358-59 (pretext analysis considers totality of the circumstances). And the court must evaluate the objective reasonableness of the deputy's discretionary decisions with the awareness that "implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against [black, indigenous, and people of color] in Washington." Sum, 199 Wn.2d at 653.

Second, with respect to the legitimate scope of the traffic stop, the trial court's initial ruling on the motion to suppress conflicts with its final oral ruling. As explained in section 1, the trial court initially ruled that Deputy Schreier "did everything he could to get the Defendant just to stop the car" and was left with no option other than shattering the window. RP 75-78. But after hearing all the testimony, and after the defense renewed the motion

to suppress,⁹ the trial court concluded it "[did not] know whether the window had to be broken or not, [and was] not going to make that decision or go down that rabbit hole." RP 246.

Whether the window "had to be broken" was not a tangential issue, it was the heart of the defense motion to suppress. CP 72 ("By smashing [J.G.]'s window and showering him with broken glass, Deputy Schreier clearly exceeded the scope of a Terry stop."). Remand is required so the trial court can clearly articulate whether the entire pre-arrest detention remained within the scope of a legitimate Terry stop and, if so, why.

E. CONCLUSION

The trial court erred by denying the motion to suppress, and the evidence presented was insufficient to prove J.G. resisted a lawful arrest. Therefore, this Court must reverse J.G.'s guilty adjudications for resisting arrest and third-degree DWLS,¹⁰

¹⁰ J.G. concedes the untainted evidence supports his conviction for failure to transfer title. <u>See State v. Lui</u>, 179 Wn.2d 457, 495, 315 P.3d 493 (2014).

⁹ RP 228.

dismiss the resisting charge with prejudice, and remand for suppression of the evidence obtained as a result of the unlawful Terry stop.

If this Court does not reverse the trial court's ruling on the suppression motion and remand for suppression of the illegally obtained evidence, it must remand for entry of written findings and conclusions under CrR 3.6 and JuCr 7.11. When the trial court enters findings under JuCr 7.11, it is not bound by its earlier ruling, but it is bound by Sum, 199 Wn.2d 627.

I certify that this document was prepared using word processing software and contains 11,667 words excluding the parts exempted by RAP 18.17.

DATED this 18th day of November, 2022.

Respectfully submitted,

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November 18, 2022 - 9:38 AM

Transmittal Information

Filed with Court: Court of Appeals Division II

Appellate Court Case Number: 57188-9

Appellate Court Case Title: State of Washington, Respondent v. J.G., Appellant

Superior Court Case Number: 22-8-00001-6

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